UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AIR ALLIANCE HOUSTON Plaintiffs, v. UNITED STATES CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD Defendant.	Civil Action No. 17-2608 APM

THE BOARD'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

The United States Chemical Safety and Hazard Investigation Board ("the Board") is a small agency established by Congress as part of the 1990 amendments to the Clean Air Act ("CAA"), 42 U.S.C. § 7412(r)(6). Modeled on the National Transportation Safety Board ("NTSB"), the Board's primary functions are similar to those of the NTSB.[1] Rather than a focus on transportation safety, however, the Board's unique role is to investigate certain types of accidental chemical releases and to recommend improved safety measures to federal and state agencies that have the authority to promulgate safety regulations. *Id.* § 7412(r)(6)(C)(i)-(ii). *See also* Declaration of Stephen J. Klejst, Executive Director of Investigations and Recommendations at the United States Chemical Safety and Hazard Investigation Board, ¶ 6 (July 6, 2018) ("Klejst Decl.").

[1] The legislative history of the 1990 CAA amendments explains as follows: "The new Chemical Safety Board is modeled on the structure, activities and authorities of the National Transportation Safety Board (NTSB), an independent Federal agency which investigates accidents in the transportation industry (aviation, railroads, pipelines, highway and marine transportation)." S. Rep. No. 101-228 at 227 (1989), Reprinted in 1990 U.S.C.C.A.N. 3385, 3612.

Plaintiffs allege that the Board has unreasonably delayed completing its obligation under CAA section 7412(r)(6)(C)(iii) to promulgate regulations "establish[ing] . . . requirements binding on persons for reporting accidental releases into the ambient air subject to the Board's investigatory jurisdiction."[2] Plaintiffs rely upon the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), which permits actions to compel an agency to perform a statutorily-required action that has been unreasonably delayed.[3]

Plaintiffs, however, lack standing and so their complaint must be dismissed for lack of jurisdiction. In the alternative, if the Court finds that Plaintiffs do have standing, the Court should deny their motion for summary judgment on the merits of their claim and instead grant the Board's cross-motion for summary judgment. Considering the Board's limited resources and the importance of its investigations, Klejst Decl. ¶¶ 27-28, the pace of the rulemaking has not been unreasonable. Finally, if the Court should find that there has been unreasonable delay, Plaintiffs' request that the Board be ordered to promulgate the reporting requirements "promptly" should be denied. *See* Memorandum In Support Of Plaintiffs' Motion for Summary Judgment, 30 (May 29, 2018) (ECF No. 15) ("Pltf. Memo"). Instead, the Court should grant the Board's requested remedy and require that the reporting requirements be signed no later than 24 months after the Court's decision. A shorter time frame would adversely affect the quality of any regulation and unduly limit the resources available for the Board to perform its other duties. Klejst Decl. ¶¶ 29-31.

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[2] For the sake of brevity, these regulations will be referred to as "the reporting requirements."

[3] The citizen suit provision in the CAA, 42 U.S.C. § 7604(a), does not authorize unreasonable delay actions against the Board. By its plain language, that section authorizes such actions only against the Administrator of the United States Protection Agency.

BACKGROUND

The Board's mission is to investigate serious chemical accidents and, based on its investigative findings, advocate for improved protections for workers, the public, and the environment. Klejst Decl. ¶ 6 (citing 42 U.S.C. § 7412(r)(6)(C)). The Board does not issue safety rules and cannot issue fines or citations for any violations of rules or statutes identified during its inspections. *Id*. The Board, however, recommends measures to other agencies with the authority to regulate chemical safety issues, such as the Department of Labor and the United States Environmental Protection Agency ("EPA"). 42 U.S.C. § 7412(r)(6)(C)(ii). S*ee also* 42 U.S.C. § 7412(r)(6)(I) and (J) (setting out requirements for EPA and the Secretary of Labor to respond to CSB safety recommendations.)

The legislative history for the 1990 CAA Amendments explains the importance of the Board's independence and the division of responsibilities between the Board, EPA, and the Occupational Health and Safety Administration as follows:

> [I]t is unlikely that an agency charged both with rule-making and investigating functions would be quick to acknowledge that existing requirements were insufficient to prevent an accident. In fact, the investigations conducted by agencies with dual responsibilities tend to focus on violations of existing rules as the cause of the accident almost to the exclusion of other contributing factors for which no enforcement or compliance actions can be taken. The purpose of an accident investigation (as authorized here) is to determine the cause or causes of an accident whether or not those causes were in violation of any current and enforceable requirement. When the causes are fully understood, that understanding may then be used to modify requirements to reduce the possibility of recurrence

S. Rep. No. 101-228 at 227 (1989), Reprinted in 1990 U.S.C.C.A.N. 3385, 3612.

The Board is not a first response agency like EPA and various fire and rescue authorities.[4] The Board is not charged with ensuring the safety of citizens following a chemical disaster,

[4] Similarly, the Board is not charged with emergency planning as set out in the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001 to 11050. This Act was

and it cannot fine or prosecute responsible parties. Rather, like the NTSB, Congress designed the CSB to be non-regulatory and independent of enforcement activities and other agencies so that its investigations might, where appropriate, review the effectiveness of regulations and regulatory enforcement. The Board's specific mission and purpose is critical to the proper understanding of the issues in this case.

In subpart (r)(6)(C)(i)-(iii), Congress set out three primary tasks for the Board. First, the Board is to "investigate (or cause to be investigated) . . . any accidental release resulting in a fatality, serious injury or substantial property damage." 42 U.S.C. § 7412(r)(6)(C)(i). After each investigation, the Board must prepare a written report explaining the circumstances and probable cause of any such release. *Id*. The Board also issues "periodic reports" regarding the safety of chemical production and use; the possible consequences of accidental releases; and proposed safety measures. *Id*. § 7412(r)(6)(C)(ii). Finally, and most relevant for present purposes, section 7412(r)(6)(C)(iii) provides that the Board "shall"

> establish by regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the Board's investigatory jurisdiction. Reporting releases to the National Response Center, in lieu of the Board directly, shall satisfy such regulations. The National Response Center shall promptly notify the Board of any releases which are within the Board's jurisdiction.[5]

The National Response Center, which is operated by the Coast Guard in conjunction with other agencies, is the national communications center for actions to respond to releases of hazardous substances. 40 C.F.R. § 300.125(a). "Notice of an oil discharge or release of a

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created to help communities plan for chemical emergencies. *Id*. §§ 11001-05. The Act also requires industry to report on the storage, use and releases of hazardous substances to federal, state, and local governments. *Id*. §§ 11021-23.

[5] A violation of any regulations promulgated under subpart (r)(6)(c)(iii) would be enforced by EPA under its CAA authority, 42 U.S.C. §§ 7413, 7414.

hazardous substance in an amount equal to or greater than the reportable quantity must be made immediately" to the duty officer at the telephone numbers identified in the regulations. *Id.* § 300.125(c). Such notices are distributed immediately to all federal entities that have a written agreement with the NRC. *Id.* § 300.125(a). The Board has such an agreement. Klejst Decl. ¶ 12.

STANDARD OF REVIEW

Fed. R. Civ. P. 56(a) provides that a federal court will grant a motion for summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Claims of unreasonable delay are appropriately resolved through summary judgment. Rule 56 is also an effective method of determining standing, which is "an indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). With respect to standing, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* At the summary judgment stage, "plaintiff can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Id.* (citing Fed. R. Civ. P. 56(e) (internal quotation marks omitted)); *see also Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 507 (D.C. Cir. 2016).

ARGUMENT

Plaintiffs' complaint is premised on the APA, 5 U.S.C. §§ 702, 706(1). Section 706(1), in relevant part, authorizes the federal courts to order agencies to perform required actions that have been unduly delayed. Plaintiffs allege that the Board has unreasonably delayed promulgating the regulations required by 42 U.S.C. § 7412(r)(6)(C)(iii) that would mandate the

reporting to the Board of any accidental releases within its jurisdiction (an obligation that could be satisfied by reporting to the National Response Center in lieu of the Board).

I. PLAINTIFFS LACK STANDING TO BRING THEIR CLAIM

The doctrine of standing is a central element in determining whether a federal court has jurisdiction in a particular case. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To establish standing, the plaintiff "must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). The plaintiffs bears the burden of proving all elements necessary to establish standing. *Spokeo*, 136 S. Ct. at 1547.

The most important of the several requirements to establish standing is that of injury in fact. *Id*. Even where a party is alleging the loss of a procedural right, *see* Pltf. Memo at 15, it must still meet the constitutional requirement of injury-in fact. *Summers v. Earth Island Inst.,* 555 U.S. 488, 501 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.") (internal quotation marks and citation omitted) (Kennedy, J., concurring); *see also Gettman v. Drug Enforcement Admin*., 290 F.3d 430, 433 (D.C. Cir. 2002) ("[T]he grant of a procedural right alone cannot serve as the basis for Article III standing unless 'the procedures in question are designed to protect some threatened concrete interest of [petitioners'] that is the ultimate basis of his standing.'") (quoting *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 28 (D.C. Cir. 2002)) (quoting *Lujan*, 504 U.S. at 573 n.8)); *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 206 (D.D.C. 2015), *aff'd*, 808 F.3d (D.C. Cir. 2015).

Plaintiffs seeking to compel an agency to promulgate a regulation can proceed under the doctrine of procedural standing. *Massachusetts*, 549 U.S. at 517. Under this doctrine, the requirements of injury in fact and causation remain unchanged; the standards for immediacy and redressability are relaxed, but not eliminated. As the D.C. Circuit explained in *Center for Law and Education v. Department of Education*, 396 F.3d 1152, 1157 (D.C. Cir. 2005):

> Where plaintiffs allege injury resulting from violation of a procedural right afforded to them by statute and designed to protect their threatened concrete interest, the courts relax-while not wholly eliminating-the issues of imminence and redressability, but not the issues of injury in fact or causation.

The importance of demonstrating imminent harm to establish a concrete injury even in procedural injury cases is conclusively established by *National Ass'n of Home Builders v. EPA*, where the court dismissed a claim of procedural standing because there was no "imminent threat of injury traceable to the challenged action." 667 F.3d 6, 15-16 (D.C. Cir. 2011) (citing *United Transp. Union v. ICC*, 891 F.2d 908, 918 (D.C. Cir. 1989) ("[B]efore we find standing in procedural injury cases, we must ensure that there is some connection between the alleged procedural injury and a substantive injury that would otherwise confer Article III standing. Without such a nexus, the procedural injury doctrine could swallow Article III standing requirements.")).

Plaintiffs argue that they have standing on several separate grounds. First, they claim that three Plaintiffs have both organizational and informational standing. Pltf. Memo at 14, 16-24. These three are Houston Air Alliance ("Alliance"),[6] Louisiana Bucket Brigade ("Brigade"), and United Support and Memorial for Workplace Fatalities ("Memorial"). They further claim that

[6] Plaintiffs use two acronyms, HAA and AAH. The Board assumes that these are simply different abbreviations for the Alliance.

Plaintiff Neil Carman PhD has standing as an individual. Pltf. Memo at 14, 22-24. *Id*. Finally, they claim that the Alliance and the Brigade also have associational standing. *Id*. at 14, 24-30.[7] For the reasons set forth below, no Plaintiff has established standing and so this matter must be dismissed.

A. Plaintiffs Have Failed to Establish Organizational or Informational Standing.

As explained in more detail below, Plaintiffs' claim that the Alliance, the Brigade, and Memorial have either informational or organizational standing boil down to the same fundamental argument: these groups are injured by the lack of information regarding accidental chemical releases that could be available to them if the Board promulgated regulations requiring that accidental releases of chemicals within its jurisdiction be reported to the Board.[8] They claim that the absence of this reporting requirement impairs the ability of these groups to perform their chief functions -- to provide information and advice to their members about the accidental releases of chemicals and to advocate for means to decrease chemical emissions. Pltf. Memo at 16-22. They further contend that these organizations must then spend time and resources collecting such information (to the extent that it is available) from other sources.

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[7] Plaintiffs do not argue that Plaintiff Public Employees for Environmental Responsibility has standing, but, as plaintiffs note, this Court has jurisdiction over the matter as long as one plaintiff can establish standing. Pltf. Memo at 15 (citing *Massachusetts*, 549 U.S. at 517).

[8] Under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982), organizations claiming standing must show that the organizations meet the same requirements as an individual. *See supra* 6 (discussing standing test). An organizational plaintiff also must show that it has "has expended resources to counteract" the asserted injury in fact. *People for the Ethical Treatment of Animals v. U.S. Dep't of Agriculture*, 797 F.3d 1087, 1091 (D.C. Cir. 2015). Claims based on "abstract social interests" or purely on the efficacy of plaintiffs' lobbying efforts are not sufficient to establish standing. *Id*.

Their claim of injury falls short. Lack of access to information constitutes the injury-in-fact required for standing only if the information "must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998). Thus, the Supreme Court's ruling that the *Akins* plaintiffs had established standing was premised on the fact that Congress required the Federal Elections Commission to make the information at issue available to the public. 524 U.S. at 21. As explained in Salt Institute v. Leavitt, 440 F .3d 156, 158-59 (4th Cir. 2006), the specificific statute at issue in *Akins* was 2 U.S.C. § 434(a)(11)(B), which provides that "[t]he Commission shall make a designation, statement, report, or notification that is filed with the Commission under this Act available for inspection by the public."

The D.C. Circuit recently reiterated that lack of access to information meets the injury in fact requirement for standing only where there is a statutory disclosure requirement in *Friends of Animals v. Jewell*, 828 F.3d 989, 992-93 (D.C. Cir. 2016).[9] At issue in that case was a provision of the Endangered Species Act, 16 U.S.C. § 1533(b)(3)(B), which "contains two functional components, a deadline requirement and a disclosure requirement." The deadline component requires that the Secretary of the Interior make certain findings within 12 months of receiving a petition seeking to list a species as endangered, but does not impose any requirements regarding the public disclosure of information. The disclosure component does require the Secretary to disclose certain information through publication in the Federal Register, but only after the

[9] *Jewell* also stated that there was a second prong to the test for informational standing: "a plaintiff may need to allege that nondisclosure has caused it to suffer the kind of harm from which Congress, in mandating disclosure, sought to protect individuals or organizations like it." 828 F.3d at 992. Because Plaintiffs have failed to identify an applicable statutory requirement for disclosure, there is no need to consider this second prong. Plaintiffs' conclusory and unsupported statement that the alleged harms to their organizations are "precisely the sort of harms to interested parties that Congress sought to prevent" by requiring the Board to adopt reporting requirements, Pltf. Memo at 24, would in any event be insufficient to meet their burden to establish this second prong.

finding has been made. Because the deadline provision did not require the Secretary to disclose any information, plaintiffs could not rely on informational injury to establish standing in an action: (1) alleging that the Secretary had failed to make the required findings by the statutory deadline; and (2) seeking an order to compel the Secretary to make the findings. 828 F.3d at 992-93. Accordingly, the D.C. Circuit affirmed the dismissal of the complaint for lack of jurisdiction.

In the present case, Plaintiffs are suing under the APA to compel the Board to promulgate reporting requirements pursuant to 42 U.S.C. § 7412(r)(6)(C)(iii). That provision on its face does not require public disclosure of any information reported to the Board in response to such regulations. Nor do Plaintiffs contend that disclosure was mandated by Congress.[10] Instead, they cite to statements by the Board in an Advance Notice of Proposed Rulemaking published by the Board in 2009 seeking public input on a possible reporting requirement. Pltf. Memo at 23

[10] A separate provision of the Board's enabling legislation, 42 U.S.C. § 7412(r)(6)(Q), provides, in part, that:

> any records, reports or information obtained by the Board shall be available to the Administrator, the Secretary of Labor, the Congress and the public, except that upon a showing satisfactory to the Board by any person that records, reports, or information, or particular part thereof (other than release or emissions data) to which the Board has access, if made public, is likely to cause substantial harm to the person's competitive position, the Board shall consider such record, report, or information or particular portion thereof confidential . . .

Plaintiffs do not claim that this provision requires disclosure for the purpose of informational standing. In any event, such an argument would fail, because the provision does not impose a disclosure requirement, such as a requirement for publication in the Federal Register. *Compare, e.g.,* 16 U.S.C. § 1539(c) (requiring that notice of certain applications be published in Federal Register); *Friends of Animals v. Jewell*, 824 F.3d 1033, 1037 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 388 (2016) (holding plaintiffs had informational standing in action to compel compliance with this provision).

(citing 74 Fed. Reg. 30,259 (June 25, 2009). Such preamble statements, however, cannot be equated with a statutory requirement for disclosure.

Plaintiffs also seek to rely on *United to Protect Democracy v. Presidential Advisory Commission on Election Integrity*, 288 F. Supp. 3d 99, 106 (D.D.C. 2017). The court in that case held that plaintiffs had standing to sue the Commission to secure information that the Commission was required to publish in the Federal Register before seeking to collect information. (Plaintiffs alleged that the Commission had issued a request for information without making the required disclosure). At issue was a provision of the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3507(a)(1)(D)(ii), which, as the court explained,

> states, in unequivocal terms, that an agency "shall not conduct or sponsor the collection of information unless in advance ... of the collection of information the agency has . . . published notice in the Federal Register ... setting forth a title for the collection of information; a summary of the collection of information; a brief description of the need for the information and the proposed use of the information; a description of the likely respondents and proposed frequency of response to the collection of information; an estimate of the burden that shall result from the collection of information ...."

288 F. Supp. 3d at 106. Thus, the Court's decision hinged on the fact that there was an explicit statutory disclosure requirement in the statute relied upon by plaintiffs. As discussed above, there is no comparable requirement in the statute at issue in the present matter. Accordingly, Plaintiffs' reliance on this decision is misplaced.

For these reasons, Plaintiffs' claim of organizational and informational standing must be rejected. Regardless of whether the reporting regulations would make information that Plaintiffs deem important more widely available, the statute requiring promulgation of the reporting requirement does not mandate that the reported information must be disclosed to the public. Therefore, the nonavailability of the information that Plaintiffs claim would result from such requirements cannot constitute an injury to a legal right that would confer either organizational

or informational standing.

B. Plaintiffs' Claim of Associational Standing Also Fails

Plaintiffs further argue that the Alliance and the Brigade have associational standing. Pltf. Memo at 24. This claim fails at the threshold, because these groups are not membership organizations representing the interests of their members. The Alliance does not even assert that it has members. While the Brigade does refer to "members," even if this claim was accurate, such purported members would not have standing to sue in their own right, which is one of the requirements that the Supreme Court has established for a group to assert representational standing. *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).[11]

1. Neither the Alliance nor the Brigade are membership organizations.

The first requirement for associational standing is that Plaintiffs must show that the organizations actually have members they represent or are the "functional equivalent of a traditional membership organization." *Fund Democracy, LLC v. S.E.C.*, 278 F.3d at 25 (citing *Hunt*, 432 U.S. at 342-45). The *Hunt* Court discerned three reasons for treating the Apple Commission like a traditional membership association. The first factor addressed by *Hunt* is that the Apple Commission served a "specialized segment of the State's economic community which is the primary beneficiary of its activities." 432 U.S. at 344. The third factor was that "the fortunes of the Commission were closely tied to those of its constituency." *Id*. at 345. The

[11] *Hunt* imposes three requirements for an organization to assert representational standing:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343. The Board will not address the second and third prongs because Plaintiffs fail at the first step.

Board will not further address these factors because the Alliance and the Brigade plainly do not meet the second factor identified by *Hunt*. The D.C. Circuit has described this second factor as follows:

> Second, the growers and dealers on whose interests the Commission relied for standing possessed all of the indicia of membership. They elected Commission members; they alone served on the Commission; and they alone financed Commission activities, including litigation. As a result, the Commission in a very real sense ... provide[d] the means by which [dealers and growers] expresse[d] their collective views and protect[ed] their collective interests.

Am. Legal Found. v. F.C.C., 808 F.2d 84, 90 (D.C. Cir. 1987) (internal citations and quotations omitted). *See also Fund Democracy, LLC v. S.E.C.*, 278 F.3d at 26; *Wash. Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 209 (D.D.C. 2007); *Basel Action Network v. Maritime Admin.*, 370 F. Supp. 2d 57, 69 (D.D.C. 2005).

The Alliance and the Brigade do not meet the criteria set forth in *Hunt* because they do not have "members" as that term is defined by the Supreme Court. With respect to the Alliance, neither Plaintiffs' Memorandum nor the Declaration of Dr. Bakeyah Nelson, Executive Director of the Alliance (May 29, 2018) (Pltf. Exhibit A), asserts that the Alliance actually has members, as opposed to working with the community at large. Moreover, the Alliance's website does not refer to members, provide any information as to who would be eligible to be a member, or identify procedures for joining the organization. http://airalliancehouston.org (last visited on July 2, 2018). Instead, both Plaintiffs' Memorandum and Dr. Nelson's Declaration address only the risks they contend that the Alliance's staff, including Dr. Nelson, suffer because the Board has not promulgated reporting requirement regulations. Associational standing, however, requires a demonstration of injury to the association's *members*. Plaintiffs provide no explanation as to why or how an organization without members can instead rely on the assertion

of injury to its employees. Accordingly, Plaintiffs have failed to meet their burden to show that the Alliance has associational standing.

The status of the Brigade is less clear-cut, but still falls short of *Hunt*'s requirements. Article II, section 1 of the Brigade's bylaws define its membership as follows.

> Membership in the [Brigade] shall consist of contributors (persons contributing at least $15 per year) to the [Brigade], volunteer air samplers, members of the local community groups that [the Brigade] supports, the members of the Board of Directors, staff members and an Executive Director.

Attachment A to the Declaration of Anne Rolfes, Founding Director of the Brigade (Pltf. Exhibit B).[12] It is notable that those identified as members are not given any rights or responsibilities. In particular, section 2 of Article II provides that members shall have no voting rights. Indeed, there is no indication that any members of the public that the by-laws designate as members of the Brigade would even be aware of their status.[13]

Under *Hunt*, the "indicia of membership" include "(i) electing the entity's leadership, (ii) serving in the entity, and (iii) financing the entity's activities." Given that section 2 of Article II of the Brigade's bylaws specifies that members cannot vote, the first criteria is not met. *See also* Article III, section 3 (Board members are elected by the Board). It appears that members cannot serve in the entity except on committees and that such participation requires the approval of the

[12] Plaintiffs also cite to the injuries that Ms. Rolfes claims as an individual. Pltf. Memo at 27-28. Again, however, the injury must be to a member. Plaintiffs do not explain how injury to an officer or employee of the Brigade can confer representational standing.

[13] The Brigade's website does not state that it considers donors or members of organizations it supports to be members of the Brigade. https://louisiana-bucket-brigade.networkforgood.com (last visited July 2, 2018). As to "volunteer air samplers," neither the Rolfes Declaration nor the Brigade's website provides any information as to what this term means; who would be included; and whether they are aware that Brigade considers them members because they volunteer for this task. http://www.labucketbrigade.org/volunteer. Presumably, the Board of Directors, the staff, and the Executive Director are aware that the by-laws designate them as members, but Plaintiffs do not explain how corporate officers and employees constitute "members" as defined by *Hunt*.

Board. Article V, section 1. Finally, it is unclear that the so-called members finance the Brigade. Several categories of membership do not require any financial contribution at all.

In sum, it appears that only the Board and the professional staff have any active role in the Brigade. Members do not affirmatively join the Brigade, but are defined by the criteria adopted by the Board. Under this criteria, many of the "members" may not even be aware of their status as such. The Supreme Court has explained that a membership association "is but the medium through which its individual members seek to make more effective the expression of their own views." *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 459 (1958). Given the structure of the Brigade, it cannot be said that the organization is a means by which members are expressing their own views; the bylaws do not give the members any role in deciding the positions or actions that the Brigade should pursue. Under these circumstances, the Brigade cannot claim standing on the ground that it is representing the interests of its members, as opposed to the Brigade's own organizational interests. *See Am. Legal Found.*, 808 F.2d at 90. *See also Wash. Legal Found.*, 477 F. Supp. 2d at 211 (rejecting claim of associational standing "where the plaintiff organizations claimed to represent members who did not play any role in selecting leadership, guiding activities, or financing activities.").

2. Even if the Brigade's definition of "members" met the criteria of *Hunt*, Plaintiffs have not shown that such members would have individual standing.

Plaintiffs' argument that the Brigade has associational standing also fails because the supposed members would not have standing if they sued as individuals, as required to establish

representational standing.[14] *Ctr. for Sustainable Economy v. Jewell*, 779 F.3d 588, 596 (D.C. Cir. 2015) (citing *Lujan*, 504 U.S. 555, 560-61). *See also supra* 6 (discussing standing requirements). Plaintiffs claim that the risk to the Brigade members of exposure to chemicals due to an accidental release would be reduced if there were regulations that required the reporting of accidental chemical releases to the Board and such reports were made public. Pltf. Memo at 27-29. As explained above, however, such claims cannot establish injury because the operative statute, 42 U.S.C. § 7412(r)(6)(C)(iii), does not require that any reports submitted regarding releases must be made available to the public. *See supra* 9-11.

Plaintiffs also speculate that the absence of a reporting requirement diminishes the effectiveness of the Board in investigating accidental releases and in helping to prevent future accidents. Pltf. Memo at 29. In support of this contention, they cite to statements made by the Board in the ANPR in which the Board requested comments from the public regarding possible reporting requirements. 74 Fed. Reg. at 30,259. These statements, however, are only the preliminary thoughts of the Board at that time and cannot be given any conclusive effect. Plaintiffs also point to statements by other government entities to the effect that reporting requirements could improve the Board's effectiveness. Pltf. Memo at 29.[15] All but one of these

[14] Given the lack of any evidence that the Alliance has members, there is no reason to address the purely hypothetical issue of whether such members could have individual standing. Given the similarity of the claims of injury to the Alliance's employees to the personal injury claimed by the Brigade's director, even if Alliance had members, they would lack individual standing for the same reasons that the Brigade could not establish such standing.

[15] These statements are from the documents submitted by Plaintiffs in their Motion to Take Judicial Notice (May 29, 2018), ECF 14. These documents are: (1) U.S. Dep't of Home. Sec. Off. of Insp. Gen., A Report on the Continuing Development of the U.S. Chemical Safety and Hazard Investigation Board, OIG-04-04 1 (2004); (2) U.S. Gov't Accountability Off., Chemical Safety Board: Improvements in Management and Oversight Are Needed, GAO-08-864R Chemical Safety Board 4, 11 (2008): (3) U.S. Envt'l Prot. Agency Off. of Insp. Gen., Chemical Safety And Hazard Investigation Board Did Not Take Effective Corrective Actions on Prior Audit Recommendations, Rep. No. 11-P-0115 8 (2011); and (4) U.S. Envt'l Prot. Agency Off.

statements predate the ANPR and do not take into account the Board's current circumstances. In particular, none of these statements, or the ANPR, 74 Fed. Reg. at 30,259, anticipated the increase of available news as the internet and the media expanded over the years since 2009.[16] Because, as explained in the ANPR, the Board always expected that the reporting requirement would complement, rather than replace, the news and the National Response Center as means of promptly identifying accidental chemical releases, the rapid expansion of news sources has lessened the need for a new means of learning of releases within the Board's jurisdiction. Klejst Decl. ¶¶ 21-22

Moreover, there is no concrete reason to expect that the reporting requirements, if promulgated, would affect the Board's choice of incidents to investigate or the results of such investigations. The Board is a small agency with only 12 investigators and a total budget of $11 million for the current fiscal year. Klejst Decl. ¶ 13. Given these circumstances, it would be impossible for the Board to investigate all incidents that fall within its statutory jurisdiction. The Board has established an incident screening process that gathers data based on reports to the National Response Center (with which the Board has an inter-agency agreement that ensures prompt notification) and the media so that the Board's Chair can select the incidents to which the Board will respond. *Id*. ¶¶ 9-20 (describing screening process). This process ensures that the Board will deploy its investigators "to only those chemical incidents that have the highest potential for chemical safety lessons learned." *Id*. ¶ 14.

Of Insp. Gen.; FY 2016: U.S. Chemical Safety and Hazard Investigation Board: Management Challenges 16-N-0221 6-7 (2016).

[16] In the ANPR, the Board explained that it was obtaining reports of releases within its jurisdiction from the internet. 74 Fed. Reg. at 30, 259. Since that time, however, the internet has expanded and become more sophisticated.

The Board first learns of approximately two-thirds of the incidents reviewed under the screening process through media reports. Klejst Decl. ¶ 16-17. Additional information is provided by the National Response Center. *Id.* ¶ 12, 20. Under the plain language of the statute, reporting releases to the National Response Center in lieu of the Board would satisfy any Board-promulgated reporting requirement. 42 U.S.C. § 7412(r)(6)(C)(iii). Given this provision, it is speculation to suggest that a new reporting requirement would improve the screening process by identifying significant incidents not already reported to the Center or covered by the media.

The utility of learning of additional incidents is also speculative. Even if there was an increase in the number of incidents reported, it is highly doubtful that there would be an increase in the number of investigations. That number is a function of the Board's available (and limited) resources. *See* Klejst Decl. ¶ 13. In 2017, the Board deployed its investigators to five incidents. *Id*. ¶ 15. Plaintiffs give no reason why an additional reporting requirement would have affected which five incidents were selected for investigation or allowed the Board to investigate more incidents.[17] Even under the relaxed requirements for redressability in procedural standing, the claim that an additional reporting requirement would have impacted the efficacy of the Board's work is excessively speculative to establish standing.

[17] The Chairperson's selection of the incidents that should be investigated is a matter of agency discretion. *See Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985). In *Heckler*, the Supreme Court pointed out that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," such as "whether a violation has occurred," "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id*. at 831. The Board Chairperson must consider similar factors in determining which incidents should be investigated by the Board. Given these circumstances, a claim that an additional reporting requirement would lead to more or improved investigations is speculative at best.

C. Plaintiffs Have Not Demonstrated that Dr. Carman Has Standing

A review of Dr. Carman's Declaration shows that most of his alleged injuries are informational and so cannot serve as a basis for standing in this instance. *Supra* 9-11. Dr. Carman also addresses injuries to Sierra Club's members. Plaintiffs do not explain how an employee, suing as an individual, can purport to have standing on behalf the Sierra Club or its members. Sierra Club is not a plaintiff here. Dr. Carman's claim of standing must be premised on a claim of injury in fact to himself, not other entities or individuals. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771-72 (2000).

Dr. Carman does assert one injury to himself as an individual: that he is "anxious and fearful of accidental chemical releases" when, in the course of his employment, he visits communities near chemical facilities in Texas. Carman Decl. ¶ 6. Plaintiffs do not rely on this allegation in their argument that Dr. Carman has standing. Such reliance would have been misplaced in any event, as Dr. Carman offers nothing to establish that the absence of a reporting requirement promulgated by the Board is the cause of this alleged injury or that promulgation of such a requirement would remedy the injury. As explained above, given the limited scope of the Board's investigative resources and the availability of information from other sources, it is speculative to assume that promulgation of the regulations would impact the number of accidental releases reported or investigated. Therefore, Plaintiffs cannot rely on Dr. Carman's declaration to establish standing.

In sum, for the reasons discussed above, the Board should be granted summary judgment on the issue of standing and the complaint should be dismissed for lack of jurisdiction. Even if Plaintiffs did have standing, they are not entitled to relief on the merits.

II. PLAINTIFFS ARE NOT ENTITLED TO THE RELIEF THEY REQUEST ON THE MERITS OF THEIR CLAIM

In claiming that the Board has unreasonably delayed in promulgating the reporting requirements, Plaintiffs rely on the factors set forth by the D.C. Circuit in *Telecommunications Research & Action Center v. FCC* ("*TRAC*"), 750 F.2d 70 (D.C. Cir. 1984). In *TRAC*, the D.C. Circuit adopted a six-part test for determining when injunctive relief is the appropriate remedy to address agency delay. The six factors under this test are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason;"
>
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
>
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
>
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
>
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
>
> (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

Id. at 80 (citations and internal quotations omitted). When measured against this standard, the pace of the Board's progress is not unreasonable. The D.C. Circuit has also recognized the importance of considering the funds made available to the agency in evaluating the agency's balancing of competing priorities. *In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) ("[t]he agency is in a unique — and authoritative — position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack.").

"Resolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Mashpee Wampanoag Tribal Council, Inc. v. Nort*on, 336 F.3d 1094, 1100 (D.C. Cir. 2003). The question of whether there has been an unreasonable delay cannot be decided based solely on the time elapsed. *Id*. The Board is a small agency with very limited resources. Although the Board published the ANPR in 2009, the Board has since prioritized its investigatory activities over a rulemaking that may not produce much additional information useful to the Board in accomplishing its mission. KIejst Decl. ¶¶ 27-28. Investigations are crucial to fulfilling the Board's statutory purpose with respect to reducing the number of accidental chemical releases and reducing potential injuries or other damage from such releases. Under these circumstances, the Board's delay is not unreasonable.

Nevertheless, the Board does not dispute that courts have found multi-year delays unreasonable in multiple cases. *See* Pltf. Memo at 13. If the Court were to similarly find that the delay was unreasonable in this case, however, the remedy requested by Plaintiffs – an order requiring the Board to act "promptly" – is too vague. It would invite future arguments over the amount of time allowed by that term in this particular context. Instead, the appropriate remedy, if one is to be provided, would be to enter a date-certain deadline by which the Board must sign a final rule.[18] *See Solenex LLC v. Jewell*, 156 F. Supp. 3d 83, 85 (D.D.C. 2015) ("Indeed, our Circuit Court frequently orders recalcitrant agencies to establish schedules, subject to court approval, to finish their reviews and reach final agency decisions.").

[18] A final rule would have to be published in the Federal Register. The interim between the Board's final action in signing the rule and the date of publication is difficult to predict and is in the control of the Office of the Federal Register, not the Board. Therefore, any deadline established by the Court should be for the Board to sign the rule – the last step that is within the Board's exclusive control.

The Board has developed a proposed schedule. As explained in the Klejst Declaration, given the Board's very limited resources and competing priorities, as well as the Board's limited experience in rulemaking, the Board should be allowed 24 months after the Court decides this matter to sign the final rule. A more expeditious schedule would unduly impact the resources available for investigations. Klejst Decl. ¶ 31. A shorter schedule would also undermine the quality of the rulemaking – an outcome that would not be in the interest of the public.

The Board's ability to comply with this schedule could be affected by events outside the Board's control. In particular, the White House has proposed eliminating all funding for the Board for the next fiscal year. Klejst Decl. ¶ 31. Such uncertainty makes planning difficult. If the final appropriations for the next fiscal year will impair the Board's ability to take final action on the rule within 24 months, the Board will promptly advise the Court and prepare a proposed alternative schedule.

CONCLUSION

Plaintiffs' action should be dismissed for lack of jurisdiction due to Plaintiffs' failure to establish standing. In the alternative, if the Court finds that there has been an unreasonable delay, the Board should be allowed 24 months after entry of the Court's judgment to sign a final rule establishing the reporting requirements.

Respectfully submitted,

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